

ValpoScholar

Valparaíso University Law Review

Volume 53 | Number 2

pp.509-544

Remedying Cursory Police Investigation of Sexual Assault and the False Reporting Charges that Result

Kelsie Plesac

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Kelsie Plesac, *Remedying Cursory Police Investigation of Sexual Assault and the False Reporting Charges that Result*, 53 Val. U. L. Rev. 509 (2019).

Available at: <https://scholar.valpo.edu/vulr/vol53/iss2/7>

This Notes is brought to you for free and open access by the Valparaíso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaíso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



REMEDYING CURSORY POLICE INVESTIGATION OF SEXUAL ASSAULT AND THE FALSE REPORTING CHARGES THAT RESULT

I. INTRODUCTION

On July 16, 2011, Lara McLeod attended a Lil Wayne concert with her sister's boyfriend, Joaquin.¹ When the two arrived at Joaquin's home after the concert, Joaquin gave Lara a choice: "have sex with him, right then and there," or accompany him "to a party where she would be gang-raped" by several men.² Earlier that day Joaquin had showed Lara his gun.³ That night he locked Lara's phone in the trunk of his car.⁴ Lara was unfamiliar with the neighborhood in which Joaquin resided.⁵ After several hours of tearful arguing, Lara, in a catatonic state, terrified that Joaquin might employ his gun or ruin the lives of her family, engaged in nonconsensual sex with Joaquin.⁶

Although Lara told her family about the incident the next day, she never intended to report it to the police.⁷ However, after her sister called the police department for an escort to pick up her and her son's possessions from the home she shared with Joaquin, an officer called Lara.⁸ He asked if the allegation that Joaquin had raped her was true.⁹ She said that it was.¹⁰ The officer then told her she needed to come in for questioning.¹¹

Lara begrudgingly went into the station to give her account of the events, which she did not call rape but "unconsensual sex."¹² She alleged that during the act she cried and repeatedly told Joaquin "no" and to stop.¹³ However, when police recovered a video of the act from Joaquin's possession, they decided that Lara "did not appear to be struggling" and

¹ See Katie J.M. Baker, "They Told Me It Never Happened," BUZZFEED (Sept. 27, 2015), https://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for?utm_term=.mbAMQQQa9#.wnGGyMy86 [https://perma.cc/UM97-WLSV].

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

510 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

that she never told Joaquin to “stop.”¹⁴ After viewing the video, the focus of the police investigation shifted from Joaquin to Lara.¹⁵ She was charged with making a false report of a crime that she never wanted to report in the first place.¹⁶

Law enforcement can be unnecessarily skeptical of reporters of rape or sexual assault.¹⁷ This problem has persisted to such a level that the International Association of Chiefs of Police (IACP) has stated that failure to take rape claims seriously is the most significant hurdle to the successful prosecution of offenders.¹⁸ The attitudes of law enforcement lead partially to underreporting and to practices of interrogating instead of interviewing, pressuring victims to drop allegations, and failing to fully investigate rape claims.¹⁹ In the most drastic cases, some victims are charged with false reporting simply because there are minor inconsistencies within their story.²⁰

¹⁴ See *id.* (highlighting the fact that the police department focused heavily on a video in which McLeod does not tell Joaquin to stop). The video was taken on Joaquin and Lara’s sister’s personal camera without McLeod’s consent. *Id.* At first, police were not able to recover the video from the camera, so they allowed Joaquin to take the camera home to attempt to retrieve the video. *Id.* After Joaquin brought the camera back, the video had appeared. *Id.*

¹⁵ See *id.*

¹⁶ See *id.* McLeod’s sister, Hera, was also charged with obstruction of justice for allegedly deleting the video that Joaquin had taken of the rape. *Id.* McLeod performed community service to get her charges expunged, and her sister’s charges were eventually dropped. *Id.* However, Hera’s charges were used in her custody dispute with Joaquin to demonstrate that she was a bad person. *Id.* Although Joaquin was a suspect in the shooting death of his ex-girlfriend and allegedly abusive to his older son, he was granted unsupervised visitation rights to his and Hera’s son. *Id.* Sadly, their son was found dead of apparent drowning during a visit with Joaquin. *Id.* Joaquin was charged with the murder of his son. *Id.*

¹⁷ See Rebecca Ruiz, *Why Don’t Cops Believe Rape Victims?*, SLATE (June 19, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/why_cops_do_n_t_believe_rape_victims_and_how_brain_science_can_solve_the.html [<https://perma.cc/3ASJ-HQF7>] (outlining Officer Tremblay’s observation that rape victims are not believed often).

¹⁸ See Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 16 (2016) [hereinafter *Prosecuting Rape Victims While Rapists Run Free*] (citing INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INVESTIGATING SEXUAL ASSAULTS: CONCEPTS AND ISSUES PAPER 12 (2005) (pointing out that the presumption that many sexual assault claims are false is a barrier to prosecuting offenders)).

¹⁹ See Lisa R. Avalos, *Policing Rape Complaints: When Reporting Rape Becomes a Crime*, 20 J. GENDER, RACE & JUST. 459, 465 (2017) [hereinafter *Policing Rape Complaints*] (proposing that a police officer’s gender bias leads to underreporting of sexual assault, finding a large quantity of sexual assault claims unfounded, and interrogating victims instead of interviewing them).

²⁰ See *Policing Rape Complaints*, *supra* note 19, at 469 (citing U.S. DEP’T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 46 (2011) (reasoning that the New

False reporting statutes, as they are now, do not adequately protect victims of sexual assault from unfairly being charged with false reporting.²¹ This is especially true due to systemic mistrust of victims and can lead to many unfounded rape or sexual assault cases, or worse, charging actual victims with false reporting without sufficient evidence that they did, in fact, knowingly give a false report of an alleged sexual assault.²²

Current false reporting statutes fail to specify the depth of investigation that law enforcement must conduct before branding an accusation false and fail to prescribe which specific types of evidence can sufficiently suggest falsity of a report.²³ Adopting language from Nevada, Texas, and Missouri's false reporting statutes as well as Missouri's proof of falsity of statements statute to amend the *Model Penal Code* can remedy this situation.²⁴ If the *Model Penal Code* is amended to reflect these changes, states can easily adopt the new model false reporting statute.²⁵

Part II of this Note provides an overview of the current state of sexual assault statistics, describes some typical victim behavior, explores the frequency of false reports of sexual violence, analyzes how each victim behavior can be construed as dishonest, and discusses why disbelief leads to insufficient investigation into sexual violence claims.²⁶ Part III analyzes the language in seven false reporting statutes to point out the inadequacies of current false reporting statutes.²⁷ Finally, Part IV proposes adopting language from Nevada, Texas, and Missouri's false reporting statutes and Missouri's proof of falsity of statements statute to create a model false reporting statute for crimes of sexual violence.²⁸

Orleans Police Department relied heavily on inconsistencies that do not prove a claim is false)).

²¹ See 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (Westlaw through 2018) (providing the elements of the crime of making a false report in Pennsylvania); N.J. STAT ANN. § 2C:28-4 (Westlaw through 2018) (declaring the elements of the crime of making a false report in New Jersey); DEL. CODE. ANN. tit. 11, § 1245 (Westlaw through 2018) (defining the crime of making a false report in Delaware).

²² See *Policing Rape Complaints*, *supra* note 19, at 463.

²³ See § 4906; § 2C:28-4; tit. 11, § 1245.

²⁴ See *infra* Part IV.

²⁵ See Cindy Barber, *Comparison of International and U.S. Employment Termination Procedures: How Far Have We Come – A Step in the Right Direction*, 19 SYRACUSE J. INT'L L. & COM. 165, 187 (1994) (declaring that model acts provide models for legislators).

²⁶ See *infra* Part II.

²⁷ See *infra* Part III (reviewing how victim behavior, lack of incentive to investigate, and inadequacy of false reporting statutes leaves innocent victims vulnerable to charges of making a false report to law enforcement).

²⁸ See *infra* Part IV (speculating that an additional subsection to false reporting statutes to accommodate reporters of sexual violence that requires a full investigation, provides a

II. BACKGROUND

This Part provides an overview of sexual assault in present society and discusses the difficulties that victims of sexual assault face.²⁹ Part II.A provides an overview of sexual assault.³⁰ Part II.B describes several common behaviors of victims of sexual assault.³¹ Specifically, it discusses four behaviors typically manifested in victims of sexual violence—tonic immobility, delayed reporting, a continued relationship with the assailant, and a fragmented or incoherent recollection of the assault—and demonstrates how each of these behaviors leads law enforcement to question the credibility of victims of sexual violence.³² Part II.C reviews false reporting of a crime in general and in regard to sexual assault.³³ It also maintains that frequent disbelief of victims of sexual violence creates low probability that claims of sexual violence will be investigated fully and sufficiently by law enforcement.³⁴

A. Sexual Assault Overview

First, Part II.A provides a definition for sexual assault, rape, and consent.³⁵ It then presents several statistics relating to the frequency, reporting, and prosecution of sexual violence.³⁶ Recently, sexual assault has been discussed prominently on a national scale.³⁷ Bill Cosby, Donald Trump, Harvey Weinstein, and many others have been accused by several women of sexual assault and harassment.³⁸ Although it is a heavily

defense to false reporting, and lays out what evidence can prove a claim to be false will resolve the number of sexual assault victims charged with false reporting).

²⁹ See *infra* Parts II.A–C.

³⁰ See *infra* Part II.A.

³¹ See *infra* Part II.B.

³² See *infra* Sections II.B.1–4.

³³ See *infra* Part II.C (confronting the current state of false reporting).

³⁴ See *infra* Part III.B (warning that distrust in victims of sexual violence can result in incomplete and insufficient investigations of their claims).

³⁵ See *infra* notes 40–45 and accompanying text.

³⁶ See *infra* notes 46–86 and accompanying text.

³⁷ See Aji Bakare, *What I Found When I Looked Beyond the Statistics of Sexual Assault*, AM. ASS'N UNIV. WOMEN (May 2, 2016), <https://www.aauw.org/2016/05/02/beyond-the-statistics-on-sexual-assault/> [https://perma.cc/3KYS-WC9X].

³⁸ See Camila Domonoske & Colin Dwyer, *Judge Declares Mistrial in Bill Cosby Sexual Assault Case*, NAT'L PUB. RADIO (June 17, 2017), <http://www.npr.org/sections/thetwo-way/2017/06/17/532752574/judge-declares-mistrial-in-bill-cosby-sexual-assault-case> [https://perma.cc/2DLP-USLE] (evaluating the number of women who have accused Bill Cosby of sexual assault). Only one woman, Andrea Constand, was able to bring her sexual assault claim against Cosby. *Id.* The statute of limitations had run out for most of his other accusers' claims. *Id.* Constand's claim against Cosby was ruled a mistrial. See also Judd Legum, *Fox & Friends Says Sexual Assault Allegations Against Donald Trump Are 'Child's Play,'* THINK PROGRESS (Oct. 16, 2017), <https://thinkprogress.org/fox-pundit-rejects-weinstein-comparison-says-trump-sexual-assault-allegations-are-childs-play-dd198091a7c8/>

discussed topic, many people cannot recognize sexual assault when it is occurring.³⁹ The Department of Justice defines sexual assault as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”⁴⁰ Some behaviors that are considered sexual assault are “forced sexual intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape.”⁴¹ Under this definition, rape is included as sexual assault.⁴² Lack of consent is an essential element of both rape and sexual assault.⁴³ The Department of Justice’s definition of sexual assault suggests that explicit consent is required for a sexual contact not to be considered a sexual assault.⁴⁴ Lack of consent within the definition also includes inability to give consent because of physical or mental incapacitation.⁴⁵

Several statistics are available to present a general view of sexual assault in its current state. In the United States, every 158 seconds someone is sexually assaulted.⁴⁶ Around 312,500 people over the age of twelve are sexually assaulted per year.⁴⁷ Nine out of ten victims of sexual violence are female, and one out of six females will be sexually assaulted

[<https://perma.cc/N6RQ-3M6E>] (examining the claims of fifteen women that Donald Trump sexually assaulted them). After the allegations were made, he was voted President of the United States of America. *Id.* See also Laurel Wamsley, *More Women Allege Misconduct by Harvey Weinstein, Including Sexual Assault*, NAT’L PUB. RADIO (Oct. 10, 2017) (explaining the sexual harassment and assault cases against Harvey Weinstein).

³⁹ See Tara Culp-Ressler, *Why People Intervene When They Witness a Sexual Assault*, THINK PROGRESS (Oct. 21, 2013), <https://thinkprogress.org/why-people-dont-intervene-when-they-witness-a-sexual-assault-and-how-we-can-change-that-2d587f405059/> [<https://perma.cc/5UYG-MZG4>].

⁴⁰ U.S. DEP’T. OF JUST., WHAT IS SEXUAL ASSAULT? (June 16, 2017), <https://www.justice.gov/ovw/sexual-assault> [<https://perma.cc/8X9L-8Y7C>] [hereinafter WHAT IS SEXUAL ASSAULT].

⁴¹ *Id.*

⁴² Compare WHAT IS SEXUAL ASSAULT, *supra* note 40 (focusing on the meaning of sexual assault), with Carbon, *infra* note 43 (highlighting the Department of Justice’s new definition of rape).

⁴³ See Susan B. Carbon, *An Updated Definition of Rape*, DEP’T OF JUST. (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape> [<https://perma.cc/UNK4-RFQF>]. Rape is defined as “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.*

⁴⁴ See WHAT IS SEXUAL ASSAULT, *supra* note 40 (directing that lack of explicit consent is an element of sexual assault).

⁴⁵ See Carbon, *supra* note 43. This incapacitation can be drug or alcohol induced. *Id.*

⁴⁶ See 153 CONG. REC. E841-03 (daily ed. Apr. 23, 2007) (statement of Rep. Maloney) (complaining that every two and a half minutes someone in America commits sexual assault).

⁴⁷ See *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/U6AQ-S4T5>] (admitting that 312,500 Americans are assaulted per year).

514 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

in her lifetime.⁴⁸ Rape myths suggest that most sexual assaults are committed by strangers and perpetuate the idea of a rapist as a stranger lurking in a “dark alley[] or other ‘dangerous’ place[].”⁴⁹ However, these conceptions are not true.⁵⁰ Seventy percent of rapes are committed by somebody the victim knows.⁵¹

Sexual assault can have a lasting psychological effect on victims.⁵² During the two weeks after an assault, ninety-four percent of women experience some degree of post-traumatic stress disorder (PTSD).⁵³ Those who experience PTSD may experience: constant fear, anger, or shame; lesser interest in participating in activities; feelings of being detached from others; inability to feel positive emotions; and difficulty recalling information from the traumatic event.⁵⁴ While nearly all women experience at least some symptoms of PTSD after their assault, the majority of victims of any gender experience at least moderate distress.⁵⁵

When an offender commits sexual assault, the victim oftentimes does not report it.⁵⁶ In fact, only about thirty-one percent of sexual assaults are

⁴⁸ See *id.* (confirming that ninety percent of sexual assault victims are women and that one out of six women have been a victim of sexual assault).

⁴⁹ *Sexual Violence Myths and Misconceptions*, ARIZ. COALITION TO END SEXUAL & DOMESTIC VIOLENCE, <http://www.acesdv.org/about-sexual-domestic-violence/sexual-violence-myths-misconceptions/> [<https://perma.cc/U2C7-Z6CW>] (dismissing the myth that most rapes are committed by strangers and that rapes often are committed by perpetrators hiding in “dark alleys or other ‘dangerous’ places”).

⁵⁰ See *id.*

⁵¹ See *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> [<https://perma.cc/3L2R-T776>] (distinguishing between rapes committed by strangers and rapes committed by people the victim knew).

⁵² See *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/XU5C-MTWH>].

⁵³ See *id.* After nine months, the percentage of women experiencing PTSD drops to thirty percent. *Id.*

⁵⁴ See *Symptoms of PTSD*, ANXIETY & DEPRESSION ASS’N AM. (Apr. 2016), <https://adaa.org/understanding-anxiety/posttraumatic-stress-disorder-ptsd/symptoms> [<https://perma.cc/WYG8-Y6GL>] (resolving that poor memory of the traumatic event, fear, anger, shame, detachment from others, disinterest in activities, and inability to feel positive emotions are all symptoms of PTSD). See also *Policing Rape Complaints*, *supra* note 19, at 493 (presenting information that Rhiannon Brooker experienced PTSD memory impairment due to her sexual assault).

⁵⁵ See *Victims of Sexual Violence*, *supra* note 52 (explaining that seventy percent of sexual assault victims experience at least a moderate amount of distress). The portion of victims that experience some kind of professional or emotional issues following their assault is sixty-seven percent when the perpetrator was a stranger. *Id.* This percentage increases to seventy-nine percent when the victim knew the perpetrator and to eighty-four percent when the perpetrator was the victim’s intimate partner. *Id.*

⁵⁶ See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/6GDR-SFCG>] (exploring the number of victims who report sexual assault).

reported to law enforcement.⁵⁷ This percentage is significantly different than the frequency of reporting for other crimes.⁵⁸ Sixty-two percent of robberies are reported to law enforcement, and sixty-three percent of assault and battery offenses are reported to law enforcement.⁵⁹ The extreme toll sexual assault has on a victim prevents many victims from reporting sexual assault.⁶⁰ Hardship due to sexual assault can make victims reluctant to report right away or to report at all, as reporting sexual assault to law enforcement can be an invasive and difficult task.⁶¹ Of the thirty-one percent of sexual assaults that are reported, only a portion are referred to a prosecutor.⁶² Out of 310 reported rapes only eleven will go to trial.⁶³ Again, these numbers contrast with statistics for robbery and assault and battery.⁶⁴ Reported robberies go to trial twice as often as reported rapes.⁶⁵ Assault and battery is referred to a prosecutor at a rate five times higher than sexual assault.⁶⁶

Physical evidence and statements made about the assault are important to help the state decide whether to press charges.⁶⁷ Physical

⁵⁷ See *id.*

⁵⁸ See *id.* (highlighting robbery and assault and battery statistics to compare them to sexual assault).

⁵⁹ See *Criminal Justice System*, *supra* note 56 (identifying that 619 out of 1000 robberies are reported to law enforcement and that 627 instances of assault and battery are reported).

⁶⁰ See *Reporting Sexual Assault to the Police*, BREAK THE CYCLE, <https://www.breakthecycle.org/blog/reporting-sexual-assault-police> [<https://perma.cc/S3F5-MERZ>] (offering that a sexual assault is a taxing experience for victims).

⁶¹ See *id.* (acknowledging that victims of sexual assault might not be ready to give their account of the event). The process of reporting begins with an officer documenting the case. *Id.* Victims can meet the officer in any setting that they wish. *Id.* Officers will inquire “whether there was additional physical assault or injury, if weapons were used, and any descriptive features that were noticed about the perpetrators.” *Id.* The interview takes a few hours, and the officer will go over the details of the sexual assault repeatedly. *Id.* See also *Criminal Justice System*, *supra* note 56 (listing the reasons victims of sexual violence do not report). Those who do not report fear their offender will retaliate, believe that law enforcement would not provide them with help, wish to keep the assault private, believe their assault is too unimportant to report, do not want to get the offender in trouble, or report the crime to another type of official. *Id.*

⁶² See *Criminal Justice System*, *supra* note 56 (reporting that out of one thousand rapes reported, only eleven are referred to a prosecutor).

⁶³ See *id.* (examining statistics that demonstrate that only 11 out of 310 rape reports go to trial). Some sexual assault cases will also be decided by plea bargain before the trial. *What to Expect from the Criminal Justice System*, *infra* note 79.

⁶⁴ See *Criminal Justice System*, *supra* note 56 (asserting that more allegations of robbery and assault and battery are referred to a prosecutor than allegations of sexual assault).

⁶⁵ See *id.* (inspecting statistics that suggest 37 of 619 robberies reported are referred to a prosecutor).

⁶⁶ See *id.*

⁶⁷ See *Evidence*, FORENSICS FOR SURVIVORS, <http://www.surviverape.org/forensics/sexual-assault-forensics/evidence> (determining that there are three types of evidence to consider in sexual assault cases).

evidence, besides DNA, that connects a perpetrator to the sexual assault, such as grass stains on the alleged perpetrators clothing, can be considered by the state.⁶⁸ Also, items that the perpetrator took from the victim may be important evidence in proving an assault.⁶⁹ The state can also consider testimony from several people.⁷⁰ Statements from the victim, the first person the victim reported the assault to, witnesses, and the people who collected evidence are important forms of testimonial evidence.⁷¹ Finally, the state can consider personal communications by the victim or perpetrator or communication between the two parties as evidence.⁷²

Only a portion of sexual assault cases that are tried in court will lead to a conviction.⁷³ Of the eleven rape cases referred to a prosecutor, seven will end with the conviction of the perpetrator.⁷⁴ This means that out of 1000 rapes committed, the perpetrator is only convicted of a felony seven times.⁷⁵ This percentage is low in comparison to robbery and assault and battery.⁷⁶ Two percent of robbers will be convicted of a felony while four percent of those who commit assault and battery will be convicted.⁷⁷ Rape

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* (examining personal communication as a form of evidence in sexual assault cases). See also Angelina Chapin, *Writing a Love Letter Instead of a Police Report: Why Victims Contact Sex Attackers*, THE GUARDIAN (Feb. 13, 2016), <https://www.theguardian.com/world/2016/feb/13/jian-ghomeshi-trial-sexual-assault-victims-response> [<https://perma.cc/4MW4-LE9X>] (clarifying that sometimes a victim will continue a relationship with her attacker). While personal communication evidence can be used to make a case against a perpetrator, it can also be used to make a case against an actual victim of sexual assault. *Id.* Sometimes victims of sexual assault will have communication with their attacker that seems inconsistent with what would be considered typical communication between a victim and an attacker. *Id.* This does not mean the victim was not actually assaulted. *Id.* This is discussed further in Part III. See *infra* Part III.

⁷³ See *Criminal Justice System*, *supra* note 56 (explaining that seven of the eleven rape allegations referred to a prosecutor will end in conviction).

⁷⁴ See *id.* Of the seven perpetrators who are convicted of rape, only six will be incarcerated. *Id.*

⁷⁵ See *id.*

⁷⁶ See *id.* Out of 1000 rapes, 310 are reported to police, 57 lead to arrest, 11 are referred to prosecutors, 7 will lead to conviction, and 6 perpetrators will be incarcerated. *Id.* Out of 1000 robberies, 619 are reported to police, 167 lead to arrest, 37 are referred to prosecutors, 22 will lead to conviction, and 20 perpetrators will be incarcerated. *Id.* Out of 1000 assault and battery crimes, 627 are reported to police, 255 lead to arrest, 105 are referred to prosecutors, 41 will lead to a conviction, and 33 perpetrators will be prosecuted. *Id.*

⁷⁷ See *id.* (highlighting that 22 of 1000 robberies and 41 of 1000 instances of assault and battery will lead to conviction). Thirty-one percent of rapes are reported to police, 5.7% lead to arrest, 1.1% are referred to prosecutors, 0.7% will lead to conviction, and 0.6% of perpetrators will be prosecuted. *Id.* In contrast, 61.9% of robberies are reported to police, 16.7% lead to arrest, 3.7% are referred to prosecutors, 2.2% will end in conviction, and 2% of perpetrators will be incarcerated. *Id.* For assault and battery, 62.7% of crimes are reported

and sexual assault trials can often boil down to a “he said, she said” argument in which it is up to the trier of fact to determine if the prosecution proved its case beyond a reasonable doubt.⁷⁸

The state has complete discretion in deciding which allegations result in pressing charges.⁷⁹ Prosecutors may decide not to proceed in pressing charges if they feel they do not have sufficient evidence to prove a sexual assault.⁸⁰ DNA is an important tool of evidence that is crucial in aiding the state’s decision to press charges.⁸¹ DNA can be obtained during a sexual assault forensic exam.⁸² The entire process, as well as the assault itself, is a traumatic experience for the victim that negatively impacts the victim’s behavior.⁸³

to police, 25.5% lead to arrest, 10.5% are referred to prosecutors, 4.1% will end in conviction, and 3.3% of perpetrators will be incarcerated. *Id.*

⁷⁸ See Jonathan Witmer-Rich, *Unpacking Confirmative Consent: Not as Great as You Hope, Not as Bad as You Fear*, 49 TEX. TECH L. REV. 57, 86 (2016) (offering information that “he said, she said” arguments are particularly common in rape and sexual assault cases). See also Lois A. Prentice, *Handling the Defense in a Rape Prosecution*, AM. JUR. TRIALS § 40 (Oct. 2017) (identifying beyond a reasonable doubt as the standard of proof prosecutors must meet in a rape case). In a rape or sexual assault case, the prosecutor must meet the standard of proof that the offense occurred beyond a reasonable doubt. *Id.* Prosecutors must show, beyond a reasonable doubt, that the victim did not consent to any sexual activity. *Id.* at § 65. See also *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958) (holding that some rights, such as a criminal defendant’s liberty, must be protected in a court of law by maintaining a “beyond a reasonable doubt” standard guaranteed by the Due Process Clause). The state has a legitimate interest in protecting the liberty of a criminal defendant. *Id.* It must protect this valuable interest by requiring the prosecution in a criminal case to meet a standard of proof “beyond a reasonable doubt.” *Id.* A defendant is awarded this right by the Due Process Clause of the Fourteenth Amendment of the Constitution. *Id.* at 526. See Lindsay J. Brice & Caroline S. Palmer, *Understanding Title IX Investigations*, 74 BENCH & BAR MINN. 24, 27 (2017) (noting that it is difficult for prosecutors to prove sexual assault cases beyond a reasonable doubt). This is often difficult for prosecutors to accomplish. *Id.*

⁷⁹ See *What to Expect From the Criminal Justice System*, RAINN, <https://www.rainn.org/articles/what-expect-criminal-justice-system> [<https://perma.cc/9QL2-NTGP>].

⁸⁰ See *id.*

⁸¹ See *The Importance of DNA in Sexual Assault Cases*, RAINN, <https://www.rainn.org/articles/importance-dna-sexual-assault-cases> [<https://perma.cc/5MT9-CLGC>].

⁸² See *id.* (noting that DNA can be obtained when a victim submits to a rape kit). See also Rebecca Campbell et al., *Forgotten Evidence: A Mixed Methods Study of Why Sexual Assault Kits (SAKS) Are Not Submitted for DNA Forensic Testing*, 41 L. & HUMAN BEHAVIOR, 454, 454 (Oct. 2017) (describing the process of conducting a forensic exam). A forensic exam is often an invasive process for a victim of sexual assault. *Id.* at 454. Forensic evidence is often collected in sexual assault kits. *Id.* Those kits contain DNA evidence such as blood, saliva, and semen. *Id.*

⁸³ See *infra* Part II.B (summarizing the various common victim behaviors of sexual assault victims).

B. *Typical Victim Behaviors in Survivors of Sexual Assault*

Victim behavior, which may often seem atypical, leads some law enforcement officers to be unnecessarily skeptical of sexual violence claims and leads them to believe that victims are fabricating their allegations.⁸⁴ People typically look to the behavior of a victim to deduce whether or not it is consistent with that of a “real” victim of sexual assault.⁸⁵ Because the behavior of a victim can be contrary to what people expect, they may construe the behavior to diminish the victim’s credibility.⁸⁶ Societal myths about sexual assault allow the public to doubt a likely victim.⁸⁷ Law enforcement officers are not exempt from experiencing this kind of victim doubt.⁸⁸ When Officer Tom Tremblay began working at the Burlington Police Department, he was disheartened by the number of his colleagues that did not believe rape victims.⁸⁹ In fact, Tremblay noted that “[u]nlike any other crime I responded to in my career, there was always this thought that a rape report was a false report.”⁹⁰ This kind of thinking arises from a misunderstanding of the typical behavior of a victim of sexual violence.⁹¹

Everyone handles the aftermath of a traumatic event differently.⁹² This is also true for victims of sexual assault.⁹³ However, there are some behaviors that typically manifest themselves in victims of sexual

⁸⁴ See Ruiz, *supra* note 17 (considering recent studies concluding that a victim of sexual assault’s coping mechanisms often confuse law enforcement officers).

⁸⁵ See Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1 THE VOICE, no. 4 (explaining that the public uses the behavior of alleged sexual assault victims to determine if their behavior is consistent with that of a “real” victim).

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, 38 L. & SOC. INQUIRY 920, 930 (2013) (granting responsibility, at least in part, to law enforcement’s skepticism of sexual assault victims for low reporting of crimes of sexual violence).

⁸⁹ See Ruiz, *supra* note 17. After beginning to interview victims of sexual violence himself, Tremblay quickly understood why they were disbelieved so often. *Id.* Some victims had difficulty remembering their assault or placing it in an understandable chronology, some were emotionless, and some smiled or laughed while recounting their assault. *Id.*

⁹⁰ *Id.*

⁹¹ See *id.* (offering scientific evidence to demonstrate that certain neurological functions make victims seem like they are not being truthful when, in fact, they are).

⁹² See *Coping with Trauma and Disasters*, MIND SPRINGS HEALTH (June 13, 2016), https://mindspringshealth.org/coping-with-trauma-disasters/?doing_wp_cron=1509135249.3772211074829101562500 [<https://perma.cc/5YT7-XG42>].

⁹³ See *How People Cope*, YALE UNIV., <http://sharecenter.yale.edu/information-about-sexual-misconduct/how-people-cope> [<https://perma.cc/4PST-VQU8>].

violence.⁹⁴ These behaviors include tonic immobility, delayed reporting, continued relationship with the assaulter, and fragmented memory.⁹⁵

Section II.B.1 examines tonic immobility and how a victim's apparent non-resistance to an attack causes law enforcement to question her honesty.⁹⁶ Section II.B.2 discusses how delayed reporting of an act of sexual violence negatively impacts a law enforcement officer's perception

⁹⁴ See 12 AM. JUR. 3D *Rape Trauma Syndrome* § 6 (2017) (remarking that not all rape victims experience the same symptoms but that there is typically a pattern of behavior among victims). A victim's disinterest in the outside world after she has been assaulted is a coping mechanism to numb the mind against extreme fear. *Id.* § 9. Oftentimes this victim behavior will make a victim disinterested in tasks that she used to find important and make her feel as though she is isolated from others. *Id.* The victim's relationship with her family may suffer, and her romantic relationships may suffer as well if the victim is struggling with intimacy, sexuality, and tenderness. *Id.* Victims of sexual assault will often change their lifestyles. *Id.* § 12. A victim may change her phone number, move, or even change her identity in order to cope with the trauma of being sexually assaulted. *Id.* A victim of sexual violence may also experience several common emotional issues like depression, anxiety, and phobia. *Id.* § 13. Depression may manifest itself as "excessive or insufficient sleeping, low energy, problems with attention and concentration, social withdrawal, and recurring negative thoughts." *Id.* A victim with anxiety may experience a wide variety of symptoms, including "apprehension, restlessness, dry mouth, dizziness, light-headedness, chest pain, upset stomach, diarrhea, worrying . . . difficulty in concentrating, and insomnia." *Id.* Victims of sexual assault may also experience long-term fears and phobias. *Id.* A victim of sexual assault may also experience sleep disturbances. *Id.* § 15. They might have difficulty falling asleep, scream while sleeping, or have nightmares. *Id.* See also Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory & its Admissibility in Criminal Trials*, 23 AM. JUR. TRIAL ADVOCACY 591, 597 (detailing the kinds of dreams that survivors of trauma typically have). Helpless dreams involve the victim replicating the state of victimization. *Id.* Survivors also sometimes have dreams that deal symbolically with the theme of rape. *Id.* Victims also have mastery dreams in which they take back control. *Id.* Finally, victims may experience an effect on their personal relationships. 12 AM. JUR. 3D § 17. See also Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 16 (2011) (examining instances where families have reacted poorly to the victim's sexual assault). After one woman told her mother about her sexual assault, her mother began to look at her as "damaged goods." *Id.* Oftentimes a victim's family as well as the victim will place some blame on the victim in order to make sense of the irrational crime of sexual assault. 12 AM. JUR. 3D § 17.

⁹⁵ See Ruiz, *supra* note 17 (commenting that tonic immobility is a typical victim behavior); Long, *supra* note 90 (pointing out that delayed reporting is a typical victim behavior); Akulikowski, *Common Victim Behaviors of Survivors of Sexual Abuse*, PA. COALITION AGAINST RAPE (Mar. 26, 2013), <https://www.pcar.org/blog/common-victim-behaviors-survivors-sexual-abuse> [<https://perma.cc/4BSZ-V6M2>] [hereinafter *Common Victim Behaviors*] (examining a continued relationship with an abuser as a type of victim behavior). See also Jennifer A. Chandler, Alexandra Moryogog, Tristana Martin Rubio & Eric Racine, *Another Look at the Legal and Ethical Consequences of Pharmacological Memory Dampening: The Case of Sexual Assault*, 41 J. L. MED. & ETHICS 859, 865 (2013) (embracing fragmented memory as a side effect of experiencing trauma).

⁹⁶ See *infra* Section II.B.1.

520 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

of a victim's credibility.⁹⁷ Section II.B.3 explores how a victim continuing a relationship or maintaining contact with her assailant leads law enforcement to assume she is being dishonest.⁹⁸ Section II.B.4 discusses how a victim's fragmented or incoherent recollection of her attack reduces her credibility in the eyes of law enforcement.⁹⁹

1. Tonic Immobility

The first kind of victim behavior that causes skepticism amongst law enforcement is "tonic immobility."¹⁰⁰ Tonic immobility is "a peritraumatic state triggered by extreme fear and characterized by muscular paralysis, inhibited vocalization, and analgesia"¹⁰¹ This phenomenon has been recognized in a number of cases where escape seems impossible.¹⁰²

Tonic immobility explains why victims often do not attempt to escape from the attacker even though he does not have a weapon.¹⁰³ When confronted with an apparently inescapable situation, tonic immobility causes "stupor and mutism" to set in.¹⁰⁴ This state of stupor and mutism is then construed by others as passivity or consenting participation in the sexual activity.¹⁰⁵

2. Delayed Reporting

The second kind of victim behavior that causes skepticism amongst law enforcement is delayed reporting.¹⁰⁶ Often, victims delay their reports of sexual assault.¹⁰⁷ In fact, a study by the National Victim Center found that of the sexual assault victims who report the crime to officials, only

⁹⁷ See *infra* Section II.B.2 (determining that delayed reporting causes law enforcement to doubt the truthfulness of a sexual violence claim).

⁹⁸ See *infra* Section II.B.3.

⁹⁹ See *infra* Section II.B.4.

¹⁰⁰ See Ruiz, *supra* note 17 (recognizing tonic immobility as a form of victim behavior). See also Melissa Hamilton, *The Reliability of Assault Victim's Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 298 (2015) (confronting the concept of tonic immobility).

¹⁰¹ Hamilton, *supra* note 100, at 298. Analgesia is unusual pain tolerance. *Id.* Tonic immobility in a human is equivalent "to an animal in the wild playing dead when faced with a predator." *Id.*

¹⁰² See *id.* at 303.

¹⁰³ See Kathryn Gigler, *The Neuroscience of Trauma from Sexual Assault*, COGNITIVE NEUROSCIENCE SOC'Y (May 26, 2015), https://www.cogneurosociety.org/sexualassault_gigler_may15/ [https://perma.cc/U7CF-LQ53].

¹⁰⁴ Hamilton, *supra* note 100, at 303.

¹⁰⁵ See *id.*

¹⁰⁶ See Long, *supra* note 90 (embracing the idea that victims of sexual assault often do not report right away). See also *Criminal Justice System*, *supra* note 56 (speculating that fear of not being believed is one reason some victims decide not to report their sexual assaults).

¹⁰⁷ See Long, *supra* note 90.

twenty-five percent report within twenty-four hours of the assault.¹⁰⁸ When they report, it can be months or even years after the assault took place.¹⁰⁹

Again, people assume that an actual victim of sexual assault would not wait this long to report.¹¹⁰ Thus, those who do delay the reporting of their assault are suspected of making a false claim.¹¹¹ Professionals, such as law enforcement, often view this victim behavior with suspicion.¹¹² However, the fact that reporting was delayed should never raise concerns about truthfulness because delayed reporting is normal.¹¹³

3. Continued Relationship with Assailant

The third kind of victim behavior that causes skepticism amongst law enforcement is continuing a relationship with the assaulter.¹¹⁴ Eighty percent of victims of rape are raped by somebody they know.¹¹⁵ When victims are raped by someone they know, oftentimes they will carry on as if nothing bad or traumatic happened.¹¹⁶ Many victims allow their rapist to drive them home or even continue to go on dates with their rapist.¹¹⁷ This behavior arises because it can be difficult for victims to process their sexual assaults when they have feelings for their attacker.¹¹⁸

In fact, victims sometimes ignore sexual abuse to focus on their attacker's loving side.¹¹⁹ Victims may become confused by their attacker's charm and believe that they simply misread the situation.¹²⁰ Sometimes they will reach out to their attacker because they crave a sense of control

¹⁰⁸ See Kimberly A. Lonsway & Joanne Archambault, *Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?*, 2017 END VIOLENCE AGAINST WOMEN INT'L 1, 3.

¹⁰⁹ See *id.* at 75 (asserting that if sexual assault victims report at all they sometimes report years after the assault took place). Reasons that a victim would delay reporting include that she is uncomfortable involving law enforcement and that stereotypes regarding what a victim should be and how a victim should act make her feel that she was not actually assaulted. *Id.* at 5.

¹¹⁰ See *id.* at 8 (confronting the expectation that "real" victims of sexual assault would report their assaults right away).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* at 3 (establishing that delayed reporting is the norm).

¹¹⁴ See Chapin, *supra* note 72 (finding that victims will contact their offender in order to regain control). See also *Common Victim Behaviors*, *supra* note 95 (examining a continued relationship with an abuser as a type of victim behavior).

¹¹⁵ See Chapin, *supra* note 72.

¹¹⁶ See *Policing Rape Complaints*, *supra* note 19, at 498.

¹¹⁷ See Chapin, *supra* note 72.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.* (underlining the case of one woman who thought her attacker was so charming that she might have misread that he sexually assaulted her).

over the traumatic situation.¹²¹ Also, women are conditioned not to create conflict with men, so female victims may attempt to fix or become friends with their attacker.¹²² Finally, victims often blame themselves for their assaults and wonder if they have led their attacker on or are simply overreacting.¹²³ Any of these victim responses can cause victims to keep in contact with their attacker.¹²⁴

4. Fragmented Memory of the Assault

The final kind of victim behavior that causes skepticism amongst law enforcement is a victim's fragmented memory of the assault.¹²⁵ Sexual assault is a very traumatic experience, and victims dealing with trauma may have difficulty with memory recall.¹²⁶ They may also have a fragmented memory of the traumatic event.¹²⁷ In fact, victims who suffer from PTSD often have difficulty "bringing to mind coherent, well-integrated autobiographical memories of the traumatic event."¹²⁸

Law enforcement should not construe the symptoms of suffering through a trauma as dishonesty.¹²⁹ If law enforcement does, then merely suffering from PTSD may undermine a victim's account of events surrounding an assault.¹³⁰ In some cases, evidence of flawed and

¹²¹ See *id.*

¹²² See *id.*

¹²³ See Chapin, *supra* note 72 (elaborating on ways in which victims blame themselves).

¹²⁴ See, e.g., *Policing Rape Complaints*, *supra* note 19, at 498 (highlighting the story of Eleanor de Freitas). Law enforcement relied on a video showing de Freitas shopping at a lingerie store with her attacker the morning after she was raped to prove that she was lying. *Id.* This type of evidence is not sufficient to prove that a rape report is false because it does not demonstrate if "de Freitas consented to sex hours before." *Id.* As a Director of Public Prosecutions at that time stated, "The fact a person remains in the company of the person who they say has just raped them in order to go shopping does not mean their allegation is untrue." *Id.*

¹²⁵ See Chandler et al., *supra* note 95, at 865–86 (embracing fragmented memory as a side effect of experiencing trauma). See also *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, CMTY. ORIENTED POLICING SERVS. 1, 17 [hereinafter *Preventing Gender Bias*] (noting that victims of sexual violence may have a fragmented memory of the assault); Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN. ST. L. REV. 1001, 1020 (demonstrating that fragmented memory is a symptom of experiencing a traumatic event). A fragmented memory can include corruption of a traumatic event via gaps or inconsistencies. *Id.*

¹²⁶ See *Preventing Gender Bias*, *supra* note 125, at 17 (establishing trouble with memory recall as a symptom of experiencing a trauma).

¹²⁷ See Chandler et al., *supra* note 95, at 865–66 (accepting fragmented memory as a symptom of PTSD).

¹²⁸ *Id.* at 865.

¹²⁹ See *Preventing Gender Bias*, *supra* note 125, at 19 (evaluating how a victim's behavior may affect the perception of her honesty by law enforcement).

¹³⁰ See Chandler et al., *supra* note 95, at 865 (arguing that the fragmented memory symptom of PTSD undermines a victim's testimony).

fragmented memories are admitted in court.¹³¹ These admissions, however, do not mean that the memories are seen as reliable.¹³² These behaviors, while completely natural, may make a victim vulnerable to being charged with false reporting.¹³³

C. False Reporting

A false report is defined as “a reported crime to a law enforcement agency that an investigation factually proves never occurred.”¹³⁴ The *Model Penal Code*, in order to protect valuable police resources, categorizes giving false reports to law enforcement authorities into “falsely incriminating another” and “fictitious reports.”¹³⁵ To falsely incriminate another, one must “knowingly give[] false information to any law enforcement officer with purpose to implicate another.”¹³⁶ Making a fictitious report occurs when one “reports to law enforcement authorities an offense or other incident . . . knowing that it did not occur.”¹³⁷ Some states, such as Pennsylvania, Vermont, Kentucky, New Jersey, and Montana, have adopted language from the *Model Penal Code* into their own statutory codes.¹³⁸ Pennsylvania and New Jersey, for instance, adopted

¹³¹ See *id.* (clarifying that some Canadian courts allow fragmented memory accounts in criminal cases).

¹³² See *id.*

¹³³ See *infra* Part II.C (discussing false reporting of sexual assault).

¹³⁴ *False Reporting*, NAT’L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf [<https://perma.cc/YN8P-NWZ4>].

¹³⁵ MODEL PENAL CODE § 241.5 (AM. LAW INST. 2017) (embracing the crimes of falsely incriminating another and making fictitious reports). See Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L. J. 593, 617 (1996) (recognizing the purpose of false reporting statutes). See also *State v. Daniels*, 397 A.2d 700, 701 (N.J. Super. Ct. App. Div. 1979) (granting that the purpose of the New Jersey false reporting statute is to prevent wasting law enforcement resources); S.B. 835, 216th Leg. (N.J. 2015) (endorsing the idea that New Jersey’s false reporting statute’s purpose is to preserve law enforcement resources); *Commonwealth v. Long*, 10 Pa. D. & C.4th 252, 254 (Pa. C.P. Fayette Mar. 21, 1991) (embracing that the nature of the crime of making a false report is to intentionally deceive law enforcement).

¹³⁶ § 241.5. This crime is a misdemeanor. *Id.* See also *Commonwealth v. Soto*, 650 A.2d 108, 110 (Pa. Super. Ct. 1994) (examining the elements of a false reporting crime).

¹³⁷ § 241.5. This crime is considered a petty misdemeanor. *Id.*

¹³⁸ Compare § 241.5 (explaining the crimes of falsely incriminating another and making a fictitious report), with KY. REV. STAT. ANN. § 519.040 (Westlaw through 2018) (applying language from the *Model Penal Code* to the Kentucky false reporting statute), and 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (Westlaw through 2018) (adding language from the *Model Penal Code* to Pennsylvania’s false reporting statute), and VT. STAT. ANN. tit. 13 § 1754 (Westlaw through 2018) (defining making a false report similarly to the *Model Penal Code*), and MONT. CODE ANN. § 45-7-205 (Westlaw through 2017) (presenting language from the *Model Penal Code*), and N.J. STAT ANN. § 2C:28-4 (Westlaw through 2018) (relying on language from the *Model Penal Code* to set forth the elements of false reporting in New Jersey).

524 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

nearly identical language to both the “falsely incriminating another” and “fictitious reports” provisions of the *Model Penal Code* false reporting statute.¹³⁹

However, many states have adopted unique provisions and language for their individual false reporting statutes.¹⁴⁰ Title 11, section 1245 of the Delaware Code lays out similar elements for falsely reporting a crime but uses different language than the *Model Penal Code*.¹⁴¹ Texas’s false reporting statute includes a provision that requires the crime to be committed with the intent to deceive.¹⁴² Missouri provides a defense for

See also John M. Burkoff, *Perjury and Falsification in Official Matters – False Reports to Law Enforcement*, 14 West’s Pa. Prac., Crim. Offenses & Defenses § 1:417 (6th ed.) (elaborating that Pennsylvania’s false reporting statute was adopted from the *Model Penal Code*); *Commonwealth v. Morris*, 1 Pa. D. & C.3d 568, 574 (Pa. C.P. Fulton May 13, 1976) (examining the elements of making a false report in Pennsylvania).

¹³⁹ Compare § 241.5 (establishing the elements of the crimes of falsely incriminating another and making a fictitious report), with § 4906 (reflecting the language of the *Model Penal Code* false reporting statute), and § 2C:28–4 (applying language from the *Model Penal Code* false reporting statute to the New Jersey false reporting statute). See also *State v. L.S.*, 132 A.3d 938, 943 (N.J. Super. Ct. App. Div. 2016) (affirming that the New Jersey false reporting statute is nearly identical to the *Model Penal Code* false reporting statute).

¹⁴⁰ See DEL. CODE ANN. tit. 11, § 1245 (defining the crime of making a false report in Delaware); TEX. PENAL CODE ANN. § 37.08 (Westlaw through 2017) (requiring that making a false report is done with the intent to deceive); MO. ANN. STAT. § 575.080 (Westlaw through 2018) (offering a defense for false reporting if no real action has been taken to investigate); NEV. REV. STAT. ANN. § 207.280 (Westlaw through 2017) (presenting the element of false reporting in Nevada that requires law enforcement to conduct an investigation). See also *Zahorik v. State*, 475 S.W.3d 459, 464 (Tex. Ct. App. 2015) (explaining the crime of making a false report in Texas); Michael B. Charlton, *False Report to a Police Officer*, 6 Tex. Prac., Tex. Crim. L. § 21.6 (2d ed.) (distinguishing the elements of making a false report in Texas); Susan B. Gyss, *False Reports to Law Enforcement Agencies*, 33 N.J. Prac. Crim. L. § 22.4 (5th ed.) (defining making a false report in New Jersey); *False Reports to Law Enforcement Authorities – Falsely Incriminating Another*, Pa. SSJI (Crim.) § 15.4906A (2016) (confirming the elements of false reporting in Pennsylvania); Assemb. 73rd Sess. (Nev. 2005) (evaluating the elements of making a false report in Nevada).

¹⁴¹ See tit. 11 § 1245 (stating the elements of making a false report in Delaware). It reads:

A person is guilty of falsely reporting an incident when, knowing the information reported, conveyed or circulated is false or baseless, the person:

. . . .

(3) Reports to a law-enforcement officer or agency:

a. The alleged occurrence of an offense or incident which did not in fact occur; or

b. An allegedly impending occurrence of an offense or incident which is not in fact about to occur; or

c. False information relating to an actual offense or incident or to the alleged implication of some person therein

Id.

¹⁴² See § 37.08.

false reporting if there was no action taken to investigate the false claim.¹⁴³ The Missouri Code also provides a proof of falsity of statements statute that prescribes the evidence needed to prove that a statement is false.¹⁴⁴ Finally, an element of Nevada's false reporting crime is that the false report caused law enforcement to conduct an investigation into the claim.¹⁴⁵

An idea exists that female victims of sexual assault often violate these statutes.¹⁴⁶ This misconception creates barriers for the few women who choose to report their sexual assault.¹⁴⁷ While there are rare instances of false reporting of sexual assault, most claims are valid.¹⁴⁸ There is some disagreement on how many reports of sexual assault are false.¹⁴⁹ This uncertainty occurs because law enforcement does not track false reports

¹⁴³ See § 575.080. See also MO. ANN. STAT. § 575.070 (Westlaw through 2018) (identifying the evidence needed to prove falsity of statements). Missouri's proof of falsity of statements statute reads:

No person shall be convicted of a violation . . . based upon the making of a false statement except upon proof of the falsity of the statement by:

- (1) The direct evidence of two witnesses; or
- (2) The direct evidence of one witness together with strongly corroborated circumstances; or
- (3) Demonstrative evidence which conclusively proves the falsity of the statement; or
- (4) A directly contradictory statement by the defendant under oath together with:
 - (a) The direct evidence of one witness; or

....

- (5) A judicial admission by the defendant that he or she made the statement knowing it was false. An admission, which is not a judicial admission, by the defendant that he or she made the statement knowing it was false may constitute strongly corroborating circumstances.

Id.

¹⁴⁴ § 575.070.

¹⁴⁵ See § 207.280.

¹⁴⁶ See *Sexual Violence Myths and Misconceptions*, *supra* note 49 (rebuking the idea that women falsely report rape).

¹⁴⁷ See *False Reporting*, *supra* note 134 (embracing the idea that the perception that many sexual assault claims are false creates obstacles for victims to report).

¹⁴⁸ See *Sexual Violence Myths and Misconceptions*, *supra* note 49.

¹⁴⁹ See *False Reporting*, *supra* note 134. See also Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 951 (2000) (clarifying why it is difficult to arrive at a true consensus for the percentage of false reports of sexual assault). Different jurisdictions have different policies regarding the false reporting of crimes. *Id.* This results in different numbers from jurisdiction to jurisdiction. *Id.* Also, many rape accusations end in plea bargains which produce no true evidence to demonstrate innocence or guilt. *Id.*

526 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

by the crime that was falsely reported.¹⁵⁰ However, the general consensus is that only two to ten percent of reports of rape are false.¹⁵¹ This rate of false reporting is consistent with false reporting in other crimes.¹⁵² For example, the false reporting rate of robbery is consistent with the rate of rape.¹⁵³

If a victim's retelling of her sexual assault seems strange or difficult to believe because of any of the victim behaviors discussed, the depth with which law enforcement investigates that victim's claim may be negatively affected.¹⁵⁴ There is significant evidence that suggests that law enforcement officers are hostile toward reporters of sexual violence.¹⁵⁵ Law enforcement operates within a society that is influenced by several rape myths.¹⁵⁶ Some rape myths are also specific to law enforcement.¹⁵⁷ The idea that many women lie about being sexually assaulted is a widely accepted view among many law enforcement officers.¹⁵⁸ One study showed that over fifty percent of law enforcement officers thought half of all sexual assault claims were false, ten percent thought the majority of sexual assault claims were false, and some officers thought that nearly all sexual assault claims were false.¹⁵⁹

Because law enforcement officers so often believe sexual violence claims are false, they have little incentive to investigate those claims.¹⁶⁰ There is no reason to investigate a crime that one believes did not

¹⁵⁰ See *Policing Rape Complaints*, *supra* note 19, at 462 (arguing that it is difficult to know how many sexual assault allegations are false because law enforcement does not track false reporting charges by the underlying alleged crime).

¹⁵¹ See *False Reporting*, *supra* note 134 (accepting that only two percent of rape reports are false).

¹⁵² See *Sexual Violence Myths and Misconceptions*, *supra* note 49 (examining how the false reporting rate of rapes compares to other crimes).

¹⁵³ See Andre W. E. A. De Zutter, Robert Horselenberg & Peter J. van Koppen, *The Prevalence of False Allegations of Rape in the United States From 2006–2010*, 2 J. FORENSIC PSYCHOL. 1, 3 (2017) (asserting that the rate of false reporting in robbery is 5.78% and the rate of false reporting in rape is 5.55%).

¹⁵⁴ See *Policing Rape Complaints*, *supra* note 19, at 477 (reporting the story of a woman whose rape claim struck law enforcement as hard to believe and suggesting this skepticism is the reason the woman's claim was not investigated in depth).

¹⁵⁵ See Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 227 (2017).

¹⁵⁶ See *id.* at 224 (describing the culture of rape myths that the police operate under).

¹⁵⁷ See *id.* (exposing that law enforcement facilitates rape myths in its own unique way).

¹⁵⁸ See *Policing Rape Complaints*, *supra* note 19, at 467.

¹⁵⁹ See *id.* at 467–68 (referring to statistics that suggest there is widespread distrust of sexual assault victims amongst law enforcement officers). In this study 891 police officers were surveyed. *Id.* Other studies show that 428 officers surveyed believed 33% of sexual assault claims were false. *Id.* at 476.

¹⁶⁰ See *id.* at 468 (reflecting on the likelihood that sexual assault reports that are assumed false will be investigated).

happen.¹⁶¹ Police incentives can also be diminished due to set performance targets.¹⁶² Law enforcement offices are often evaluated by their ability to lower crime rates.¹⁶³ Therefore, law enforcement officers may pressure sexual assault victims to retract their claims in order to maintain the appearance of a lower crime rate.¹⁶⁴ This approach is called “performance management culture” and comes at the cost of actually “reducing crime and protecting victims” of sexual violence.¹⁶⁵ When performance management culture is coupled with the societal mistrust of sexual assault victims, it may cause law enforcement to conclude that a victim is lying about being sexually assaulted simply because her case is difficult to investigate.¹⁶⁶ If law enforcement officers are skeptical about sexual assault claims, it allows them to lighten their workload.¹⁶⁷ Therefore, there is some incentive for law enforcement officers to brand reporters of sexual assault as false reporters.¹⁶⁸

Certain guidelines mandating proper investigative protocol regarding sexual assault claims do exist.¹⁶⁹ The IACP has set guidelines to attempt to curtail false report charges against sexual assault victims.¹⁷⁰ The guidelines require all reports to be regarded as true until evidence proves otherwise.¹⁷¹ They stipulate that a sexual assault accusation should not be deemed false after an initial interview and that the decision to label an

¹⁶¹ See *id.* (rejecting that law enforcement officers would investigate crimes they do not believe were committed). See also Yung, *supra* note 155, at 241. This idea is illustrated in a case where a woman claimed she was tied up in her home and raped while being threatened with a knife. *Id.* Police did not investigate her claim and instead attributed it to an “overactive imagination.” *Id.* Besides chalking D.M.’s claim to the product of an overactive imagination, police also threatened that D.M. would be removed from public housing if she failed a lie detector test. *Id.* After police intimidation caused her to drop her claim, she was charged with making a false report and settled outside of court. *Id.* D.M. agreed to pay a fine and receive mental health counseling to avoid a more substantial penalty. *Id.* Police would later find a photograph of the attack and the woman’s identification in the possession of a serial rapist. *Id.*

¹⁶² See *Prosecuting Rape Victims While Rapists Run Free*, *supra* note 18, at 40.

¹⁶³ See *id.* at 40–41 (declaring that police chiefs are often judged by the ability to reduce the crime rate).

¹⁶⁴ See *id.* at 40 (scrutinizing law enforcement officers’ behavior of pressuring victims of sexual assault to drop their claims).

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 42 (complaining that being skeptical of rape claims makes it easy for law enforcement officers to conclude that victims are lying).

¹⁶⁷ See *id.* at 43.

¹⁶⁸ See *Prosecuting Rape Victims While Rapists Go Free*, *supra* note 18, at 47 (considering that performance management culture and societal mistrust of sexual assault victims creates an incentive to brand sexual assault reporters as liars).

¹⁶⁹ See *infra* notes 170–78 and accompanying text (examining IACP guidelines that dictate the handling of sexual assault investigations).

¹⁷⁰ See *False Reporting*, *supra* note 134.

¹⁷¹ See SEXUAL ASSAULT INCIDENT REPORTS, INT’L ASS’N OF CHIEFS OF POLICE 1, 2.

accusation false should not be based on the victim's reaction.¹⁷² The guidelines specifically state that "[s]ilence is not consent" and suggest that an officer document the victim's fear reaction whether it is fight, flight, or freeze.¹⁷³ The IACP also sets guidelines to help law enforcement officers recognize how trauma affects a victim's behavior.¹⁷⁴ The guidelines dictate that a victim's emotional state is not an indication of how legitimate the claim is.¹⁷⁵ They also assert that a delay in reporting should not be considered a reason to forego a thorough investigation of the claim.¹⁷⁶ The guidelines note that trauma sometimes causes victims to have difficulty remembering all of the details of the assault, so if a victim does not remember details it does not mean she is lying.¹⁷⁷ Despite adoption of these guidelines, women like Lara McLeod are still wrongly charged with false reporting, and current false reporting statutes enable this.¹⁷⁸

III. ANALYSIS

Crimes of sexual violence are underreported crimes with low rates of false reporting.¹⁷⁹ Yet victims like Lara McCleod are too often unfairly charged with making a false report.¹⁸⁰ This problem persists primarily

¹⁷² See *id.*

¹⁷³ *Id.* at 3.

¹⁷⁴ See *id.* at 5 (clarifying that officers must understand how trauma affects a victim's behavior).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See SEXUAL ASSAULT INCIDENT REPORTS, *supra* note 171, at 5.

¹⁷⁸ See *infra* Part III (criticizing current false reporting false statutes). See also *State v. L.S.*, 132 A.3d 938, 945 (N.J. Super. Ct. App. Div. 2016) (holding that the state did not show beyond a reasonable doubt that L.S. reported a sexual assault knowing that it did not occur); *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010) (outlining the case of Sara Reedy who was charged with false reporting of sexual assault, although she was, in fact, assaulted), *rev'g in part* *Reedy v. Evanson*, No. 2:06cv1080, 2009 WL 1076700 (W.D. Pa. Apr. 20, 2009) (examining the case of Sara Reedy who said she was sexually assaulted while working a convenience store and was later charged with false reporting); *Reedy v. Township of Cranberry*, No. 2:06cv1080, 2007 WL 2318084 (W. D. Pa. Aug. 9, 2007) (staying case against one defendant, but permitting plaintiff to pursue discovery on other defendants, and allowing plaintiff to amend complaint); *Davison v. Kennedy*, No. 3:15-1373, 2016 WL 538906 (M.D. Pa. Feb. 11, 2016) (evaluating Kennedy's sexual assault claim against Davison and her false reporting charge); *Pantusco v. Sorrell*, No. 09-3518, 2011 WL 2148392 (D.N.J. May 31, 2011) (focusing on Pantusco's claim that Sorrell sexually assaulted him).

¹⁷⁹ See *Criminal Justice System*, *supra* note 56 (declaring that a large amount of sexual assaults go unreported). See also *Sexual Violence Myths and Misconceptions*, *supra* note 49 (rebuking the idea that many claims of sexual assault are false and settling on two percent as a probable number of claims that are actually false).

¹⁸⁰ See *supra* Part I (examining McLeod's rape and false reporting charges).

because of systemic distrust of victims of sexual violence.¹⁸¹ In fact, one reason victims choose not to report their rape or sexual assault is because they fear no one will believe their claims.¹⁸² Recent cases, like McLeod's, and declarations from some law enforcement officers suggest victims are justified in feeling this way.¹⁸³ Law enforcement officers interpret typical victim behaviors as dishonesty.¹⁸⁴ Instead of fully investigating these claims, law enforcement officers brand them as false, and the language in many current false reporting statutes allows them to do so.¹⁸⁵

Part III.A highlights the inadequacies of current false reporting statutes using the *Model Penal Code*, Pennsylvania, New Jersey, and Delaware statutes as examples.¹⁸⁶ These statutes lack three essential elements: a full investigation requirement; a proof of falsity of statements clause; and a provided defense when no steps are taken to investigate a claim.¹⁸⁷ Part III.A also examines Texas, Nevada, and Missouri false reporting statutes as well as Missouri's proof of falsity of statements statute to demonstrate how certain language in these statutes would better serve reporters of sexual violence.¹⁸⁸ Part III.B examines how amending current false reporting statutes modeled after the *Model Penal Code* would make IACP guidelines more mandatory for law enforcement agencies.¹⁸⁹ It also provides an example of law enforcement discrediting a victim because of the victim's behavior by analyzing the case of Sara Reedy.¹⁹⁰

A. Analysis of Current False Reporting Statutes

While failure to fully investigate a sexual assault claim before branding it false is a problem, there is very little language in false

¹⁸¹ See Corrigan, *supra* note 88, at 920 (granting responsibility to law enforcement's skepticism of sexual assault victims for low reporting of crimes of sexual violence).

¹⁸² See *Criminal Justice System*, *supra* note 56.

¹⁸³ See *supra* Part I (considering Lara McLeod's false reporting case). See also Ruiz, *supra* note 17 (noting Officer Tom Tremblay's observation that victims of rape are seldom believed by law enforcement).

¹⁸⁴ See *supra* Sections II.B.1-4 (drawing a connection between typical victim behavior and distrust of victims).

¹⁸⁵ See *infra* Parts III.A-B (evaluating law enforcement motivation to investigate crimes they do not believe occurred and current false reporting statutes).

¹⁸⁶ See *infra* Part III.A.

¹⁸⁷ See *infra* Part III.A (complaining that current false reporting statutes do not provide important provisions for victims of sexual violence).

¹⁸⁸ See *infra* Part III.A.

¹⁸⁹ See *infra* Part III.B (declaring that false reporting statutes with language adopted from Texas, Nevada, and Missouri statutes would force law enforcement officers to follow IACP guidelines more closely).

¹⁹⁰ See *infra* Part III.B (highlighting Sara Reedy's case of improper charging of false reporting).

530 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

reporting statutes that requires a full investigation.¹⁹¹ Current false reporting statutes also have very little language that defines the type of evidence that can support the assumption that a claim is false or language providing a defense to false reporting if no real action is taken to investigate the claim.¹⁹²

Part III.A specifically examines the *Model Penal Code*, Pennsylvania, New Jersey, Delaware, Texas, Nevada, and Missouri false reporting statutes, as well as Missouri's proof of falsity of statements statute. The Pennsylvania, New Jersey, and Delaware statutes were selected for two reasons. First, the Pennsylvania and New Jersey statutes are nearly identical to the current *Model Penal Code* false reporting statute.¹⁹³ Second, Third Circuit courts, which are located in these three states, tried the largest volume of false reporting of sexual assault cases.¹⁹⁴ Part III.A examines the inadequacies of those three statutes as well as the *Model Penal Code* and highlights language from Texas, Nevada, and Missouri false reporting statutes and Missouri's proof of falsity of statements statute that would better serve reporters of sexual violence.¹⁹⁵

The *Model Penal Code's* false reporting crime has four elements that must be proven beyond a reasonable doubt: (1) that a statement was made to a law enforcement officer; (2) that the statement was false; (3) that the reporter knew the statement was false; and (4) that the statement was made to implicate another.¹⁹⁶ The *Model Penal Code* statute for false reporting is inadequate for reporters of sexual violence.¹⁹⁷ Therefore, because they contain language nearly identical to the *Model Penal Code*, the

¹⁹¹ See 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (providing the elements of the crime of making a false report in Pennsylvania); N.J. STAT. ANN. § 2C:28-4 (declaring the elements of the crime of making a false report in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (defining the crime of making a false report in Delaware). But see NEV. REV. STAT. ANN. § 207.280 (presenting the element of false reporting in Nevada that requires law enforcement to conduct an investigation).

¹⁹² See § 4906; § 1245; § 2C:28-4. But see also MO. ANN. STAT. § 575.070 (identifying the evidence needed to prove falsity of statements); MO. ANN. STAT. § 575.080 (offering a defense for false reporting if no real action has been taken to investigate the claim).

¹⁹³ Compare MODEL PENAL CODE § 241.5 (AM. LAW INST. 2017) (explaining the crimes of falsely incriminating another and making a fictitious report), with § 4906 (reflecting the language of the *Model Penal Code* false reporting statute), and § 2C:28-4 (applying language from the *Model Penal Code* false reporting statute to the New Jersey false reporting statute).

¹⁹⁴ See, e.g., *State v. L.S.*, 132 A.3d 938, 945 (N.J. Super. Ct. App. Div. 2016) (holding that the state did not show beyond a reasonable doubt that L.S. reported a sexual assault knowing that it did not occur); cases cited *supra* note 178 (citing *Reedy*, *Pantusco*, and *Kennedy*).

¹⁹⁵ See *infra* notes 196-249 and accompanying text.

¹⁹⁶ See *Commonwealth v. Soto*, 650 A.2d 108, 110 (Pa. Super. Ct. 1994) (examining the four elements of a false reporting crime).

¹⁹⁷ See *infra* notes 200-45 and accompanying text (inspecting current false reporting statutes and their inadequacies for reporters of sexual violence).

current Pennsylvania and New Jersey false reporting statutes are also inadequate.¹⁹⁸ These statutes are inadequate for falsely reporting crimes of violence for many reasons.¹⁹⁹

First, subsection (b)(1) of the *Model Penal Code*'s statute broadly prescribes the kind of statements given to law enforcement that would constitute a violation of the statute.²⁰⁰ In fact, when Pennsylvania chose to adopt the *Model Penal Code* statute, it broadened the scope of the previous Pennsylvania false reporting statute.²⁰¹ Subsection (b)(1) is violated when a person falsely reports to law enforcement officers "an offense or other incident within their concern."²⁰² The statute applies even when someone gives a false answer when questioned by law enforcement.²⁰³

This broad language allows reporters of sexual violence to be charged with false reporting if some aspects of their story are false.²⁰⁴ This is evident in the case of L.S., who was charged with making a false report after inaccurately stating where her assault took place and the extent of her acquaintance with the assaulter.²⁰⁵ Her conviction was later overturned because the evidence presented was not sufficient to prove beyond a reasonable doubt that an assault did not occur.²⁰⁶

Broad language that permits a reporter of a crime to be charged with making a false report based on any misrepresented incident within law enforcement's concern (such as location or relationship with the attacker) is particularly detrimental to reporters of sexual assault.²⁰⁷ Victims of sexual assault can often have a fragmented or flawed memory of their

¹⁹⁸ Compare § 241.5 (explaining the crimes of falsely incriminating another and making a fictitious report), with 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (adding language from the *Model Penal Code* to Pennsylvania's false reporting statute), and N.J. STAT. ANN. § 2C:28-4 (relying on language from the *Model Penal Code* to set forth the elements of false reporting in New Jersey).

¹⁹⁹ See *infra* notes 200-24 and accompanying text (examining the inadequacies of the *Model Penal Code*, Pennsylvania, New Jersey, and Delaware false reporting statutes).

²⁰⁰ See § 2C:28-4 (declaring that a person makes a false report to an officer by falsely reporting an "offense or other incident . . . knowing that it did not occur").

²⁰¹ See Burkoff, *supra* note 138 (arguing that Pennsylvania's current false reporting statute, adopted from the *Model Penal Code*, has a broader scope than previous Pennsylvania false reporting statutes).

²⁰² § 2C:28-4.

²⁰³ See Burkoff, *supra* note 138.

²⁰⁴ See *State v. L.S.*, 132 A.3d 938, 939 (N.J. Super. Ct. App. Div. 2016) (inspecting L.S.'s conviction for making a false report).

²⁰⁵ See *id.* at 941.

²⁰⁶ See *id.* at 945 (chastising the municipal and trial court's decision to convict L.S. of making a false report despite having insufficient evidence that the assault did not occur).

²⁰⁷ See *supra* Section II.B.2.

attack due to post-traumatic stress.²⁰⁸ The statutory language that results in convictions due to a misrepresentation of the location where an assault occurred or a misrepresentation of how well-acquainted a victim was with the assaulter, instead of evidence that suggests no assault occurred, punishes the very normal victim behavior of fragmented memory.²⁰⁹

The purpose of false reporting statutes is to dissuade people from intentionally thwarting efforts of law enforcement.²¹⁰ However, the *Model Penal Code*, Pennsylvania, New Jersey, and Delaware false reporting statutes do not explicitly dictate that intent.²¹¹ The Pennsylvania statutory language does provide a specific intent if the false report is made in a state of emergency and causes law enforcement to divert efforts away from addressing the emergency but not when a crime has simply been reported.²¹²

These statutes, as well as others with very similar language, require only a general intent for false reporting.²¹³ Because the purpose of a false reporting statute is to prevent people from intentionally derailing the work of law enforcement,²¹⁴ it makes sense, particularly concerning crimes of sexual violence, that the statute would require the specific intent to do so.²¹⁵ The statutes should, but do not, require a specific intent to mislead law enforcement in making a false report.²¹⁶ For example, older versions

²⁰⁸ See *supra* Section II.B.2 (supporting the idea that victims of sexual assault often have fragmented memories of their assault).

²⁰⁹ See *L.S.*, 132 A.3d at 944 (examining the New Jersey false reporting statute that considers falsely reporting any incident of interest to law enforcement a violation of the statute).

²¹⁰ See Russell, *supra* note 135, at 617 (recognizing the purpose of false reporting statutes). See also *State v. Daniels*, 397 A.2d 700, 701 (N.J. Super. Ct. App. Div. 1979) (granting that the purpose of the New Jersey false reporting statute is to prevent wasting law enforcement resources); S.B. 835, 216th Leg. (N.J. 2015) (endorsing the idea that New Jersey's false reporting statute's purpose is to preserve law enforcement resources).

²¹¹ See 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (outlining the elements of false reporting to law enforcement in Pennsylvania); N.J. STAT. ANN. § 2C:28-4 (providing the elements of false reporting in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (defining the elements of false reporting of an incident in Delaware).

²¹² See *False Reports to Law Enforcement Authorities*, *supra* note 140 (declaring that in a false reporting case a jury should be instructed to consider whether the false report detracted from law enforcement efforts in a state of emergency).

²¹³ See Russell, *supra* note 135, at 618.

²¹⁴ See *id.* at 617 (advocating that false reporting statutes exist to keep people from thwarting the efforts of law enforcement). See also *Commonwealth v. Long*, 10 Pa. D. & C.4th 252, 254 (Pa. C.P. Fayette Mar. 21, 1991) (embracing that the nature of the crime of making a false report is to intentionally deceive law enforcement).

²¹⁵ See Russell, *supra* note 135, at 619 (asserting that if New Jersey's false reporting statute required specific intent, then a prosecutor would have to show that someone accused of making a false report made that report with the intent to mislead law enforcement).

²¹⁶ See tit. 18, § 4906 (assigning the elements of false reporting to law enforcement in Pennsylvania); § 2C:28-4 (defining the elements of false reporting in New Jersey); tit. 11

of the New Jersey false reporting statute included an element that the false statement made must have potential to derail law enforcement investigation.²¹⁷ However, the current statute, modeled after the *Model Penal Code*, was amended to exclude this element.²¹⁸ The New Jersey Superior Court has interpreted that the New Jersey false reporting statute punishes all false statements that could have deterred police investigation.²¹⁹

Sexual assault is already an underreported crime.²²⁰ Typical victim behaviors like tonic immobility, delayed reporting, fragmented memory, and a continued relationship with the assaulter already make law enforcement officers doubt the honesty of the victims of these crimes.²²¹ This doubt from law enforcement makes victims reluctant to report assaults.²²² If false reporting statutes require the specific intent of misleading or hindering the investigation of law enforcement, it would make it more difficult to accuse reporters of the actual crime of making false claims.²²³ Even if police investigation is inadequate, a specific intent requirement adds the extra hurdle for the prosecution to overcome by forcing it to prove that a false report was made in order to mislead law enforcement.²²⁴

At least one state has a false reporting statute that contains language requiring the specific intent to mislead law enforcement.²²⁵ Texas's false reporting statute specifically penalizes making a false statement to law

§ 1245 (showing the elements of false reporting of an incident in Delaware). *See also* Russell, *supra* note 135, at 619.

²¹⁷ *See* Gyss, *supra* note 140.

²¹⁸ *See id.*

²¹⁹ *See* State v. Daniels, 397 A.2d 700, 701 (N.J. Super. Ct. App. Div. 1979) (inspecting New Jersey's false reporting statute to show that it can be violated by making a report that could waste law enforcement resources).

²²⁰ *See Criminal Justice System*, *supra* note 56 (distinguishing sexual assault as an underreported crime).

²²¹ *See supra* Sections II.B.1–4 (establishing tonic immobility, delayed reporting, continued relationship with the assaulter, and fragmented memory as victim behaviors that cause skepticism among law enforcement).

²²² *See Policing Rape Complaints*, *supra* note 19, at 465 (exposing the idea that law enforcement attitudes toward victims of sexual assault contribute to underreporting of the crime).

²²³ *See* Russell, *supra* note 135, at 619 (explaining that changing the intent from general to specific for New Jersey's false reporting statute would make it difficult to hold defendants accountable).

²²⁴ *See id.* (highlighting that a specific intent requirement for false reporting would force prosecutors to prove beyond a reasonable doubt that the reporter had the intention of interfering with a police investigation).

²²⁵ *See* TEX. PENAL CODE ANN. § 37.08 (imposing the requirement that a false statement be made "with the intent to deceive").

534 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

enforcement “with intent to deceive.”²²⁶ Under this statute, a reporter cannot be convicted of false reporting for seeking out “action on a valid grievance.”²²⁷ The reporter must act in bad faith.²²⁸ Bad faith could be proven by evidence of a strongly sufficient motive to lie but not a mere refutation of the reporter’s claim.²²⁹

Courts have interpreted this bad faith requirement as a protection of one’s constitutional right to “apply to government for redress of grievances.”²³⁰ The language in this statute would not only better serve the interest of survivors accused of making a false report by forcing prosecutors to prove beyond a reasonable doubt that the report was given with the intent to deceive,²³¹ but also better protect their constitutional right to seek redress for alleged wrongs.²³²

The current *Model Penal Code*, Pennsylvania, New Jersey, and Delaware false reporting statutes also make no requirement of an investigation and do not provide a defense if an investigation is not conducted.²³³ Because law enforcement officers sometimes rely on interpretation of counterintuitive victim behaviors instead of evidence retrieved during serious investigation, language requiring investigation and providing a defense when claims are not properly investigated will better meet the needs of those accused of falsely reporting sexual assault.²³⁴ Unlike the Pennsylvania, New Jersey, Delaware, and *Model Penal Code*’s false reporting statutes, Nevada’s false reporting statute specifically punishes a false statement “which causes a law enforcement agency to conduct a criminal or internal investigation.”²³⁵ This language

²²⁶ *Id.*

²²⁷ *Zahorik v. State*, 475 S.W.3d 459, 464 (Tex. Ct. App. 2015).

²²⁸ *See id.*

²²⁹ *See* Charlton, *supra* note 140 (analyzing the evidence required to show that a false reporter did so in bad faith).

²³⁰ *Id.*

²³¹ *See* Russell, *supra* note 135, at 619 (inferring that a specific intent requirement in New Jersey’s false reporting statute would force prosecutors to prove that element of the crime beyond a reasonable doubt).

²³² *See Zahorik*, 475 S.W.3d at 464.

²³³ *See* 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (outlining the elements of false reporting to law enforcement in Pennsylvania); N.J. STAT. ANN. § 2C:28-4 (defining the elements of false reporting in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (showing the elements of false reporting of an incident in Delaware). *See also* Russell, *supra* note 135, at 619 (noting that if New Jersey’s false reporting statute required specific intent, then a prosecutor would have to demonstrate that the false reporter made the report with the intention of misleading law enforcement).

²³⁴ *See Policing Rape Complaints*, *supra* note 19, at 468 (reflecting on the likelihood that sexual assault reports that are assumed false will be investigated).

²³⁵ *See* Russell, *supra* note 135, at 619. *Compare* NEV. REV. STAT. ANN. § 207.280 (limiting false reports made punishable to ones that prompted a police investigation), *with* § 4906 (outlining the elements of false reporting to law enforcement in Pennsylvania), *and* § 2C:28-

was adopted by Nevada because it was more narrowly tailored to address the legitimate purpose of the statute.²³⁶ This language requires that a false statement prompt an investigation in order to be punishable by this statute, requiring law enforcement to rely on investigation instead of victim behaviors.²³⁷

Missouri's false reporting statute also contains language that ensures that victims will not be accused of false reporting without law enforcement investigating their claims.²³⁸ The statute provides that "[i]t is a defense to a prosecution under subsection 1 of this section [making a false report] that the person retracted the false statement or report before the law enforcement officer or any other person took substantial action in reliance thereon."²³⁹ Because the purpose of false reporting statutes is to prevent intentional attempts to thwart police efforts, this language would be helpful to add to a model false reporting statute in order to protect those accused without an investigation.²⁴⁰

Finally, the *Model Penal Code*, Pennsylvania, New Jersey, and Delaware false reporting statutes provide no guidelines for the types of evidence eligible to presume that a sexual assault report is false.²⁴¹ Some survivors of sexual assault, like McLeod, are charged with false reporting although there is little actual evidence that their claim is indeed false.²⁴² While Pennsylvania, New Jersey, Delaware, and the *Model Penal Code's* false reporting statutes lay out no specific language pertaining to acceptable evidence, language in Missouri's proof of falsity of statements statute does.²⁴³ Missouri's statute provides that no one will be convicted of making a false statement without the following proof:

4 (defining the elements of false reporting in New Jersey), and tit. 11, § 1245 (showing the elements of false reporting of an incident in Delaware).

²³⁶ See Assemb. 73rd Sess. (Nev. 2005) (approving of additional language to Nevada's false reporting statute because it closely prevents the problem the statute is supposed to prevent).

²³⁷ See § 207.280.

²³⁸ See MO. ANN. STAT. § 575.080 (providing a defense to making a false report if the report did not trigger an investigation).

²³⁹ § 575.080.

²⁴⁰ See Russell, *supra* note 135, at 617 (underlining that false reporting statutes exist to prevent people from intentionally thwarting police investigation).

²⁴¹ See 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (penalizing citizens of Pennsylvania for making false reports to law enforcement); N.J. STAT. ANN. § 2C:28-4 (defining the elements of false reporting in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (showing the elements of false reporting of an incident in Delaware).

²⁴² See Baker, *supra* note 1 (highlighting the fact that the police department focused heavily on a video in which McLeod does not tell Joaquin to stop). See also Reedy v. Evanson, 615 F.3d 197, 202 (3d Cir. 2010) (examining Evanson's belief that Reedy fabricated the assault in order to cover up her robbery of the convenience store).

²⁴³ Compare MO. ANN. STAT. § 575.070 (assigning specific kinds of evidence required to prove a false statement), with § 4906 (outlining the elements of false reporting to law

(1) The direct evidence of two witnesses; or (2) [t]he direct evidence of one witness together with strongly corroborating circumstances; or . . . (4) [a] directly contradictory statement by the defendant under oath together with: (a) [t]he direct evidence of one witness; or (b) [s]trongly corroborating circumstances; or (5) [a] judicial admission by the defendant that he or she made the statement knowing it was false.²⁴⁴

Adding this language to a model false reporting statute would ensure, again, that actual evidence and not merely victim behavior is the basis for every sexual assault investigation.²⁴⁵

While the current *Model Penal Code*, Pennsylvania, and New Jersey false reporting statutes are insufficient for reporters of sexual violence in many ways, they are sufficient for these victims in one regard.²⁴⁶ The current statutory language dictates that a person can only be charged with making a false report by knowingly giving false information.²⁴⁷ Therefore, the prosecution must find beyond a reasonable doubt that a person made a false report knowing that it did not happen.²⁴⁸ This language could be beneficial to victims of sexual assault dealing with a flawed or fragmented memory of the assault because it requires the court to find that the reporter intentionally misrepresented information instead of simply misremembering details.²⁴⁹

B. False Reporting Statutes and the IACP Guidelines

Current Pennsylvania, New Jersey, and Delaware false reporting statutes also allow law enforcement officers to ignore investigative protocol laid out in the IACP guidelines.²⁵⁰ As previously discussed, the

enforcement in Pennsylvania), and § 2C:28-4 (defining the elements of false reporting in New Jersey), and tit. 11 § 1245 (showing the elements of false reporting of an incident in Delaware). See also Russell, *supra* note 135, at 619.

²⁴⁴ § 575.070.

²⁴⁵ See § 575.070.

²⁴⁶ See *infra* notes 247-48 and accompanying text (citing *Morris* and *Taylor* for requiring perpetrators to knowingly make a false report to be convicted).

²⁴⁷ See *Commonwealth v. Morris*, 1 Pa. D. & C.3d 568, 574 (Pa. C.P. Fulton May 13, 1976) (declaring that in order to convict a person of making a false report, the court must find that the accused knowingly made false statements to law enforcement).

²⁴⁸ See *id.* (clarifying that a court must find beyond a reasonable doubt that a reporter knowingly gave false information in order to convict her of false reporting). See also *State v. Taylor*, 902 A.2d 962, 966 (N.J. Super. Ct. Law Div. 2006) (approving that the requisite *mens rea* for making a false report is to make the report knowingly).

²⁴⁹ See *Morris*, 1 Pa. D. & C.3d at 574.

²⁵⁰ See *False Reporting*, *supra* note 134 (acknowledging that the IACP guidelines are not mandatory).

IACP provides guidelines highlighting proper protocol for investigating sexual assault and deeming reports false.²⁵¹ The guidelines dictate that for a sexual assault claim to be deemed false there must be a full investigation into the claim and evidence that an assault did not occur.²⁵² The guidelines also require that investigating officers do not base their decision to deem a claim false solely on the victim's behavior.²⁵³

When adopted and strictly followed, these guidelines have improved law enforcement's handling of sexual assault claims.²⁵⁴ However, while the IACP guidelines protect actual victims from being wrongfully charged with false reporting, false reporting statutes do not.²⁵⁵ An actual victim of sexual assault can still be charged with false reporting even if law enforcement agencies fall short of the recommended investigative protocol.²⁵⁶ This is evident in the case of Sara Reedy.²⁵⁷

Reedy claimed she was sexually assaulted while working at a convenience store.²⁵⁸ While evidence suggested the assault did take place, Frank Evanson, the lead investigator of her case chose to ignore it and gave more weight to his initial impression of Reedy's guilt.²⁵⁹ In his initial interview with Reedy, Evanson repeatedly called Reedy a liar.²⁶⁰ When Reedy began crying while facing Evanson's aggressive interrogation, Evanson told Reedy, "[Your] tears aren't going to save [you] now."²⁶¹

²⁵¹ See *id.*

²⁵² See *Prosecuting Rape Victims While Rapists Run Free*, *supra* note 18, at 18.

²⁵³ See *id.*

²⁵⁴ See *id.* (complimenting the positive impact the IACP guidelines have had for certain law enforcement offices). Law enforcement handling of sexual assault claims in Philadelphia, Austin, Kansas City, and Grand Rapids has improved since adopting the IACP guidelines. *Id.*

²⁵⁵ See *id.* (declaring that IACP guidelines require that law enforcement officers must conduct a full investigation that uncovers evidence that an assault did not occur in order to deem a sexual assault claim false and clarifying that IACP guidelines prohibit law enforcement from basing a decision to deem a sexual assault claim false on the victim's behavior). See also 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (providing the elements of the crime of making a false report in Pennsylvania); N.J. STAT. ANN. § 2C:28-4 (declaring the elements of the crime of making a false report in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (defining the crime of making a false report in Delaware).

²⁵⁶ See *False Reporting*, *supra* note 134.

²⁵⁷ See *Reedy v. Evanson*, 615 F.3d 197, 202 (3d Cir. 2010) (showing that the lead investigator in Reedy's case believed Reedy was lying to cover up her robbery of the convenience store despite another rape very similar to Reedy's happening close by shortly after Reedy's case).

²⁵⁸ See *id.* (explaining that Reedy was sexually assaulted at gunpoint while working in a convenience store).

²⁵⁹ See *id.* (establishing that Reedy submitted to a rape kit and examining Evanson's belief that Reedy fabricated the assault in order to cover up her robbery of the convenience store).

²⁶⁰ See *id.* at 204.

²⁶¹ *Id.*

538 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

Evanson decided Reedy was guilty at the initial interview, before he could thoroughly investigate her claim.²⁶² Even when another sexual assault that bore many similarities to Reedy's happened in the same township, Evanson stuck with his initial assumption that Reedy was guilty and proceeded to suggest legal action against Reedy.²⁶³ Evanson did not follow proper IACP guidelines while investigating Reedy's claim,²⁶⁴ and current statutory language allowed him not to do so.²⁶⁵ Adjusting current statutory language could make the effective IACP recommendations more mandatory.²⁶⁶

For instance, adding the "which causes a law enforcement agency to conduct a criminal or internal investigation" language from Nevada's false reporting statute to the model statute, which currently does not require an investigation, would give more authority to the IACP's recommendation requiring a full investigation into sexual assault claims.²⁶⁷ The current *Model Penal Code* false reporting statute is also completely silent regarding what the basis of a false reporting accusation should be, whereas the IACP guidelines suggest that those accusations should be based in evidence that an assault did not occur and prohibit basing an accusation off of victim behavior.²⁶⁸ Adding Missouri's proof of falsity of statements statute to the current model statute would align that statute and those that adopt its language more closely with the IACP

²⁶² See *id.* (identifying that in their initial interview Evanson called Reedy a liar and told her that her tears would not save her).

²⁶³ See Reedy, 615 F.3d at 202 (noting that Evanson decided to pursue legal action against Reedy for making a false report).

²⁶⁴ See *id.* (examining Evanson's behavior in during his initial interview with Reedy). See also *False Reporting*, *supra* note 134 (presenting information that the IACP has guidelines regarding false reporting for sexual assault); *Prosecuting Rape Victims While Rapists Run Free*, *supra* note 18, at 18 (declaring that IACP guidelines require that law enforcement officers must conduct a full investigation that uncovers evidence that an assault did not occur in order to deem a sexual assault claim false).

²⁶⁵ See *supra* Part III.A.

²⁶⁶ See *infra* Part IV.

²⁶⁷ Compare NEV. REV. STAT. ANN. § 207.280 (limiting false reports made punishable to ones that prompted a police investigation), with 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (outlining the elements of false reporting to law enforcement in Pennsylvania); N.J. STAT. ANN. § 2C:28-4 (defining the elements of false reporting in New Jersey); DEL. CODE ANN. tit. 11, § 1245 (showing the elements of false reporting in Delaware).

²⁶⁸ See § 4906 (providing the elements of the crime of making a false report in Pennsylvania); § 2C:28-4 (declaring the elements for false reporting in New Jersey); tit. 11, § 1245 (defining the crime of making a false report in Delaware). See also *Prosecuting Rape Victims While Rapists Run Free*, *supra* note 18, at 18 (declaring that IACP guidelines require that law enforcement officers must conduct a full investigation that uncovers evidence that an assault did not occur in order to deem a sexual assault claim false and clarifying that IACP guidelines prohibit law enforcement from basing a decision to deem a sexual assault claim false on the victim's behavior).

guidelines that require evidence that an assault did not occur.²⁶⁹ Amending the language of the *Model Penal Code* false reporting statute to more closely reflect the IACP guidelines would bolster protection of those unfairly accused of false reporting by requiring that law enforcement officers strictly adhere to the IACP recommendations before charging a potential victim of sexual violence with false reporting.

IV. CONTRIBUTION

While the IACP guidelines are excellent recommendations that have been adopted by some law enforcement offices, these guidelines are not mandatory.²⁷⁰ Part IV.A proposes the implementation of a mandatory guideline.²⁷¹ It suggests that false reporting statutes be revised to be more comprehensive in protecting those reporting sexual violence.²⁷² These revisions will be added as an overhaul to the *Model Penal Code* false reporting statute so states can easily adopt it.²⁷³

Part IV.B anticipates criticism of revising false reporting statutes.²⁷⁴ It first addresses the concern that those who do falsely report sexual assault will go unpunished.²⁷⁵ It then addresses and rebukes the idea that those who are falsely accused of sexual assault will go unprotected under the revised statute.²⁷⁶ Finally, it pushes back against the assertion that the guidelines set forth by the IACP are sufficient enough to eliminate the problem of charging actual rape victims with false reporting.²⁷⁷

²⁶⁹ See *Prosecuting Rape Victims While Rapists Run Free*, *supra* note 18, at 18 (considering IACP guidelines that require that law enforcement officers must conduct a full investigation that uncovers evidence that an assault did not occur in order to deem a sexual assault claim false and commenting that IACP guidelines prohibit law enforcement from basing a decision to deem a sexual assault claim false on the victim's behavior). Compare MO. ANN. STAT. § 575.070 (assigning specific kinds of evidence required to prove a false statement), with § 4906 (outlining the elements of false reporting to law enforcement in Pennsylvania), and § 2C:28-4 (defining the elements of false reporting in New Jersey), and tit. 11 § 1245 (showing the elements of false reporting of an incident in Delaware).

²⁷⁰ See *False Reporting*, *supra* note 134.

²⁷¹ See *infra* Part IV.A.

²⁷² See *infra* Part IV.A.

²⁷³ See *infra* Part IV.A (proposing that the *Model Penal Code* false reporting statute be amended to include a subsection for reporting of sexual violence).

²⁷⁴ See *infra* Part IV.B (rebuking criticisms that might arise from the revision of the *Model Penal Code* false reporting statute).

²⁷⁵ See *infra* Part IV.B (recognizing the criticism that adding a rape-specific subsection to a false reporting statute would offer unnecessary protections for actual false reporters of rape).

²⁷⁶ See *infra* Part IV.B (denying that revising the false reporting statute of the *Model Penal Code* would leave those falsely accused of sexual assault unprotected).

²⁷⁷ See *infra* Part IV.B (rendering false the idea that IACP guidelines are sufficient to prevent the conviction of actual rape victims of false reporting).

540 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

A. *Revising the Model Penal Code's False Reporting Statute*

With language adopted by Texas, Missouri, and Nevada false reporting statutes and Missouri's proof of falsity of statements statute, the *Model Penal Code's* false reporting statute would appear as such:

241.5. FALSE REPORTS TO LAW ENFORCEMENT AUTHORITIES.

(a) A person commits an offense if, with the intent to deceive, he or she knowingly makes a false statement *which causes a law enforcement agency to conduct a criminal or internal investigation* and makes the statement to:

- (1) a peace officer or federal special investigator conducting the investigation; or
- (2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation.

(b) *No person shall be convicted of a violation of subsection (a) of this section based upon the making of a false statement except upon proof of the falsity of the statement by:*

- (1) *The direct evidence of two witnesses; or*
- (2) *The direct evidence of one witness together with strongly corroborating circumstances; or*
- (3) *Demonstrative evidence which conclusively proves the falsity of the statement; or*
- (4) *A directly contradictory statement by the defendant under oath together with the direct evidence of one witness; or*
- (5) *A judicial admission by the defendant that he or she made the statement knowing it was false. An admission, which is not a judicial admission, by the defendant that he or she made the statement knowing it was false may constitute strongly corroborating circumstances.*

(c) *It is a defense to a prosecution under subsection (a) of this section that the person retracted the false statement or report before the law enforcement officer or any other person took substantial action in reliance thereon.*

(d) An offense under this section is a Class B misdemeanor.²⁷⁸

²⁷⁸ See TEX. PENAL CODE ANN. § 37.08; NEV. REV. STAT. ANN. § 207.280; MO. ANN. STAT. § 575.070; MO. ANN. STAT. § 575.080. The unitalicized portions of this proposed statute were

B. Commentary

This model statute corrects the inadequacies of the New Jersey, Pennsylvania, and Delaware false reporting statutes that have language very similar to the *Model Penal Code* false reporting statute.²⁷⁹ Adding the phrase “which causes a law enforcement agency to conduct a full criminal or internal investigation” makes a thorough investigation an essential element of the crime of making a false report.²⁸⁰ Therefore, a court could not convict an alleged false reporting offender unless the state could demonstrate beyond a reasonable doubt that law enforcement completely investigated the claim.²⁸¹ This additional language may also make a prosecutor more hesitant to pursue charges against an alleged false reporter if she feels that there is not sufficient evidence to prove law enforcement conducted a full investigation.²⁸²

Section (b) of the statute outlines the types of evidence that should be considered when determining whether someone has made a false claim.²⁸³ This section ensures that law enforcement will not rely solely on counterintuitive behavior of victims when determining the validity of a sexual assault claim.²⁸⁴ Instead, law enforcement will have to follow the

taken from the *Texas Penal Code*’s false reporting statute. The italicized text in part (a) of the statute was adopted from Nevada’s false reporting statute. The language of section (b) was adopted from Missouri’s proof of falsity of statements statute. The language in section (c) was adopted from Missouri’s false reporting statute. The author added “or she” in section (a). See also Martin A. Schwartz, *Admissibility of Investigatory Reports in § 1983 Civil Rights Actions – A User’s Manual*, 79 MARQ. L. REV. 453, 490 (1996) (recognizing that in *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D.N.Y. 1990), *aff’d*, 926 F.2d 142 (2d Cir. 1991), Gentile complained that the Suffolk Police Department did not seriously investigate police misconduct). In this statute “substantial action” will be defined as serious police investigation. *Id.*

²⁷⁹ See *supra* note 278 and accompanying text (endorsing a major revision to current false reporting statutes). See also N.J. STAT. ANN. § 2C:28-4; 18 PA. STAT. AND CONS. STAT. ANN. § 4906; DEL. CODE. ANN. tit. 11, § 1245.

²⁸⁰ *Supra* note 278 and accompanying text.

²⁸¹ See *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (admitting that the standard of proof the state must meet in a criminal case is “beyond a reasonable doubt” in order to protect the liberty of a criminal defendant).

²⁸² See *What to Expect from the Criminal Justice System*, *supra* note 79 (confirming that a prosecutor may not decide to pursue charges if there is not sufficient evidence to prove all elements of the crime).

²⁸³ See *supra* note 278 and accompanying text.

²⁸⁴ See *supra* Part III.A (demonstrating how the victim behaviors of tonic immobility, delayed reporting, continuing a relationship with the assailant, and fragmented memory cause distrust of victims amongst law enforcement officers).

542 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

guidelines of the IACP to recover evidence that falls under a category provided in section (b).²⁸⁵

Section (c) of the new statute provides a defense for alleged false reporters whose allegations did not cause law enforcement to take substantial action into investigating their claims.²⁸⁶ False reporting statutes are enacted with the intent of protecting valuable law enforcement resources.²⁸⁷ Therefore, if a person's claims do not cause significant resources to be expended (*i.e.*, through a thorough investigation), charging the claimant goes against the intent of a false reporting statute.²⁸⁸ This provision will provide extra protection to alleged false reporters whose claims were not thoroughly investigated before being labeled false.²⁸⁹

There are three issues some may raise in response to the revised statute: (1) those who do falsely report rape may go unpunished; (2) those who are falsely accused of sexual assault may be unprotected; and (3) IACP guidelines may be sufficient to combat the problem of actual sexual assault victims being charged with false reporting.²⁹⁰ As previously discussed, two to ten percent of sexual assault claims are false.²⁹¹ Skeptics would argue that added protections in the revised statute would mean false reporters of sexual assault would go unpunished.²⁹² However, the statute only provides that an alleged false reporter will escape punishment if the state cannot prove beyond a reasonable doubt, after a thorough investigation, that she did in fact provide a false report.²⁹³ The state will have to meet the same "beyond a reasonable doubt" burden

²⁸⁵ See *supra* note 278 and accompanying text. See generally SEXUAL ASSAULT INCIDENT REPORTS, *supra* note 171 (exploring how a law enforcement officer should ideally handle a sexual assault investigation).

²⁸⁶ See *supra* note 278 and accompanying text (granting a defense for alleged false reporters whose claims did not instigate a substantial investigation).

²⁸⁷ See *State v. Dietze*, 660 S.E.2d 197, 199 (N.C. Ct. App. 2008).

²⁸⁸ See *id.* (holding that the false reporting statute is intended only to protect against false claims that would drain the valuable resources of law enforcement).

²⁸⁹ See *supra* note 278 and accompanying text (identifying a defense for alleged false reporters whose claims were not thoroughly investigated).

²⁹⁰ See *infra* notes 291–303 and accompanying text (analyzing each counterargument).

²⁹¹ See *False Reporting*, *supra* note 134 (inferring that only two percent of rape reports are false).

²⁹² See *What Can You Do if Someone Falsely Accuses You of Rape?*, HG.ORG, <https://www.hg.org/article.asp?id=31767> [<https://perma.cc/3J46-MD54>] (inviting the idea that prosecutors may side with a false accuser believing the accusation was simply a mistake).

²⁹³ See *supra* note 278 and accompanying text (offering protections to alleged false reporters whose claims were not fully investigated or found to be false with insufficient evidence).

of proof in the alleged false reporter's case as it will in the alleged sexual assaulter's case.²⁹⁴

In the same vein, there may be concern that those who are falsely accused of sexual assault will not be protected under the revised statute.²⁹⁵ Again, the state must meet the highest standard of proof in order to convict someone of sexual assault.²⁹⁶ As already noted, it can be difficult for prosecutors to reach the "beyond a reasonable doubt" benchmark in a sexual assault case.²⁹⁷ This high burden is why only 7 out of 1000 rape claims result in a conviction.²⁹⁸ The revised statute simply makes it equally as challenging to convict an alleged false reporter.²⁹⁹

Finally, some might argue that because the IACP has guidelines in place to improve the handling of sexual assault claims, revising false reporting statutes is unnecessary.³⁰⁰ While the IACP guidelines would drastically decrease systemic distrust of victims if they were followed carefully by all law enforcement offices, they are not mandatory guidelines.³⁰¹ Because rape victims like Lara McLeod and Sara Reedy continue to be charged with false reporting, a problem exists despite the guidelines.³⁰² If a state adopts the new statute, the statute will become binding on that state's courts, making its authority mandatory.³⁰³

V. CONCLUSION

While some may object, a statutory revision is necessary in order to protect actual victims of sexual assault from being accused of making a

²⁹⁴ See *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958) (noting that the state must prove its case "beyond a reasonable doubt").

²⁹⁵ See *What Can You Do if Someone Falsely Accuses You of Rape*, *supra* note 292 (observing that prosecutors will too often side with a false reporter because of the nature of rape as a touchy subject).

²⁹⁶ See *Speiser*, 357 U.S. at 525–26.

²⁹⁷ See *Brice & Palmer*, *supra* note 78, at 27 (pointing out that it is difficult for prosecutors to prove sexual assault cases "beyond a reasonable doubt").

²⁹⁸ See *Criminal Justice System*, *supra* note 56 (offering statistics demonstrating the number of perpetrators of sexual assault who are actually convicted of a felony).

²⁹⁹ See *supra* note 278 and accompanying text (advising that an allegedly false claim must have been thoroughly investigated in order for the claimant to be convicted of false reporting).

³⁰⁰ See *False Reporting*, *supra* note 134 (referring to IACP guidelines regarding false reporting for sexual assault). The NSVRC does not opine that the guidelines are sufficient. They merely suggest that the IACP has set guidelines in place to combat the systemic mistrust of victims of sexual assault.

³⁰¹ See *id.* (reporting that IACP guidelines are not mandatory).

³⁰² See *supra* Part I (reviewing Lara McLeod's rape case). See also *supra* note 161 (summarizing the handling of D.M.'s rape case).

³⁰³ See *Legal Research Basics*, CHAPMAN UNIV., <http://libguides.law.chapman.edu/c.php?g=678775&p=4786126> (underlining that statutes are mandatory authority and binding on a court).

544 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

false report. The revised statute ensures that a claim will be investigated fully before it can be deemed false. It ensures that many kinds of evidence, not only counterintuitive victim behavior, will be assessed in determining whether a sexual assault claim is false. It also provides a defense for alleged false reporters if these thorough investigative measures are not taken. If adopted, a revised statute will be a mandatory authority that will protect actual sexual assault victims from being accused even in municipalities that do not follow IACP guidelines for investigating sexual assault.

The revised statute—unlike the current *Model Penal Code* false reporting statute and Pennsylvania, New Jersey, and Delaware false reporting statutes—does not contain inadequacies that allow for actual victims of sexual assault to be charged with false reporting. It will make it increasingly difficult for law enforcement officers to allow their bias against victims of sexual assault to deter them from fully investigating claims. Victim behaviors such as tonic immobility, delayed reporting, fragmented memory, and a continued relationship with the attacker alone will not stand as grounds to deem a sexual assault case as false. This shift from doubting victims based on their behavior to investigating all claims thoroughly will reduce the number of actual sexual assault victims accused of false reporting so that tragic cases like Lara McLeod's will no longer occur.

Kelsie Plesac*

* J.D. Candidate, Valparaiso University Law School (2019); B.A. English Writing and Communication Studies, Saint Mary's College (May 2015). To my mom, Kathy, thank you for being my biggest cheerleader and the most selfless person I know. I am sorry for making you worried when I pulled all those late nighters in the law review office. To my brother, Joey, thank you for convincing me that I could not write an entire forty-page Note in the span of one Halloween weekend. You are younger than me but much, much wiser. To my Dad, Joe, thank you for always being calm during my complaining and rage-walks around the house. You helped provide much-needed perspective. I love the three of you immeasurably. And to everyone who took the time to read this Note, provide feedback, and give it some much-needed touch-ups, I am so grateful. It takes a village to get a Note published, and I have been blessed to be surrounded by the most phenomenal village of editors, faculty, advisors, and mentors. Long live Valpo.